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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: January 13, 1983 (sic)

March 9, 1982.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. JESSE E. ESCHBACH, Circuit Judge

| | | |
|---|---|---|
| TERRY L. BORTON | ) | Appeal from the |
| | ) | United States |
| Plaintiff-Appellee | ) | District Court |
| | ) | for the Northern |
| No. 81-1536 vs. | ) | District of |
| | ) | Indiana, South |
| UNITED PARCEL | ) | Bend Division |
| SERVICE, INC. | ) | |
| | ) | No. S 79-C-0274 |
| Defendant-Appellant | ) | Allen Sharp, Judge |

O R D E R

United Parcel Service ("UPS") ap-

*The Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

peals from a judgment on a jury verdict for appellee Borton, and from the district court's denials of UPS's motions for directed verdict, judgment notwithstanding the verdict, or new trial. Borton brought his action in the district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, alleging that he had been wrongfully fired by UPS, and that his union had breached its duty of fair representation in handling the grievance filed after his firing. The dispositive issue on appeal is whether Borton presented evidence of his union's breach of its duty of fair representation sufficient to go to the jury.

Borton, a UPS truck driver, was fired after he struck another truck on the highway while driving UPS's tractor-trailer. This accident caused a second

collision in which a third motorist was seriously injured. Borton was fired without a warning notice. The issue before the joint UPS/union grievance committee that ultimately upheld this firing was whether there was just cause for the firing under the terms of the bargaining agreement between UPS and the local union.

Under that agreement, the grievance committee's decision was "final and binding on both parties." Borton attacks the finality of decision of the contractual dispute-resolution body on the ground that he was not fairly represented by his union at the grievance proceeding.

Even if the evidence and its inferences are viewed most favorably to Borton, the evidence presented showed no more than that the union failed at

the grievance hearing to call certain witnesses that might have been called, and to make certain arguments that might have been made. Perhaps the union's most serious supposed lapse was in failing to argue that Borton had not been "reckless" and that therefore his firing without prior warning was in breach of the collective bargaining agreement.

The union representative did argue that the accident resulting in Borton's firing was "not his fault." The better practice may have been for the union to argue also that even if Bolton (sic) were "at fault," he had not been "reckless." Here, as usual, hindsight is invaluable. But if the union had made this argument and Borton's firing had nevertheless been upheld, Borton might now be arguing that it was

error for the union to concede, even arguendo, any fault on his part.

The duty of "fair" representation does not require a union to provide the best representation. Borton, in order to show a breach of that duty, had to "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Hoffman v. Lonza, Inc., NO. 80-2314, slip op. at 5 (7th Cir. 1981) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971). Nothing less than "egregious" union misconduct breaches the union's duty. Hoffman, slip op, at 11 (Cudahy, J., concurring). The tactical and strategic errors (if such they are) in the union's handling of Borton's grievance do not sink to the level of egregious misconduct.

The district court's judgment on

the jury verdict is hereby reversed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 22, 1982

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. JOHN W. PECK, Senior Circuit Judge*

Hon. JESSE E. ESCHBACH, Circuit Judge

| | | |
|---|---|---|
| TERRY L. BORTON, | ) | Appeal from the |
| | ) | United States |
| Plaintiff-Appellee, | ) | District Court |
| | ) | for the Northern |
| No. 81-1536 vs. | ) | District of |
| | ) | Indiana, South |
| UNITED PARCEL | ) | Bend Division |
| SERVICE, INC., | ) | |
| | ) | No. S79-C-0274 |
| Defendant-Appellant | ) | |

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en

*Judge Peck, United States Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

banc filed by counsel for the plaintiff-appellee, no active member of the court has requested a vote on the suggestion for an en banc rehearing. All members of the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that said petition for rehearing and suggestion for rehearing en banc be, and the same are hereby DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 25, 1981

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

| | | |
|---|---|---|
| TERRY L. BORTON, | ) | Appeal from the |
| | ) | United States |
| Plaintiff-Appellee, | ) | District Court |
| | ) | for the Northern |
| No. 81-1536 vs. | ) | District of |
| | ) | Indiana, South |
| UNITED PARCEL | ) | Bend Division |
| SERVICE, INC., | ) | |
| | ) | No. S 79-C-0274 |
| Defendant-Appellant. | ) | Judge Allen Sharp |

This matter comes before the Court for its consideration upon the following documents:

1. The "MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" filed herein on September 8,

1981, by counsel for the plaintiff-appellee.

2. The "MEMORANDUM IN RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" filed herein on September 17, 1981, by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the "MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION" is hereby DENIED.

28 U.S.C.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

F.R.App.P.

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court oi appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party:
(i) for judgment under Rule 50(b);
(ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless

the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.